No. 80-1589

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In the Supreme Court of the United States

OCTOBER TERM, 1980

BROWN BOVERI ELECTRIC, INC., SWITCHGEAR SYSTEMS DIVISION (FORMERLY GOULD, INC., SWITCHGEAR DIVISION), PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board correctly concluded that petitioner violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by discharging two employees because they participated in a sympathy walkout.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is not yet reported. The decision and order of the National Labor Relations Board (Pet. App. C1-C3) is reported at 238 N.L.R.B. 618.

JURISDICTION

The judgment of the court of appeals (Pet. App. A15-A16) was entered on November 7, 1980. A petition for rehearing was denied on December 18, 1980 (Pet. App. B1-B2). The petition for a writ of certiorari was filed on March 18, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Relevant portions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at pages 2-4 of the petition. In addition, Section 10(a) of the National Labor Relations Act, 29 U.S.C. 160(a), provides in pertinent part:

> The Board is empowered * * * to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise * * *.

STATEMENT

1. Petitioner's manufacturing employees are represented by the International Brotherhood of Electrical Workers, Local Union 584 ("the Union").[1] The Union's construction division established an informational picket line at petitioner's premises in furtherance of its campaign to organize the employees of electrical construction contractors (Pet. App. C9, C15). The picketing was directed at Houchin Electric Co., a nonunion electrical contractor that was working on a plant expansion job at petitioner's plant (*id.* at C9). The picket sign was entitled "Information," and it notified readers that Houchin Electric Company did not have an agreement with the Union (*ibid.*).

The shop steward of the manufacturing employees, upon learning of the picket line, called the Union business agent to inquire about it. She was told that the picketing was directed at Houchin, was purely informational, and was not related to any violation by petitioner of the collective bargaining contract covering the plant employees. The Union

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[1]The Union has three divisions: manufacturing, construction and maintenance (Pet. App. C8). Petitioner's employees were represented by the manufacturing division.

agent added that it was up to each employee to decide what to do since the Union would not advise the employees (Pet. App. C10-C11). The shop steward and the unit chairman conveyed this information to the first shift employees, and shortly thereafter most of them walked out (*id.* at C11-C12). The Union business agent, upon learning that the employees had left the plant, informed the second shift workers that the picketing had no relation to the employees' collective bargaining contract, and that they should proceed to work, which they did (*id.* at C16).

The following day all the first shift employees were put back to work except for the shop steward and unit chairman, who were discharged for participating in the sympathy walkout (Pet. App. C17-C18). The Union filed grievances on behalf of the two discharged employees.[2] The arbitrator to whom the grievances were referred assumed without explanation that the walkout was a violation of the

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[2]The collective bargaining agreement between the Union and petitioner provided (Pet. App. C10):

> In view of the procedure for the orderly settlement of grievances provided under the terms of this Agreement, the Union agrees that there will be no strike, work interference, or other stoppage or slowdown of work, total or partial, during the term of this Agreement.
>
> An employee or employees who participate in any such action in violation of this Agreement may be disciplined or discharged * * *.

The contract contained a grievance procedure leading to arbitration. To be arbitrable, a grievance had to allege misapplication or violation of a specific provision of the agreement and was limited to subject matter expressly contained in the agreement (*id.* at C9).

collective bargaining contract, but, finding that the discipline was too severe, reduced the discharges to suspensions.[3] Petitioner did not comply with the award, contending that the arbitrator had no authority to modify the penalty (Pet. App. C18).

2. The Union also filed unfair labor practice charges with the Board. The Board, affirming the rulings and findings of the administrative law judge (Pet. App. C4-C30), concluded that the sympathy walkout was activity protected by Section 7 of the Act, 29 U.S.C. 157, and therefore that petitioner violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by discharging the shop steward and unit chairman for participating in the walkout (*id.* at C1-C3; see also C19-C22).

The Board rejected petitioner's contention that the walkout was not protected because the picketing was violative of Sections 8(b)(4)(ii)(B) and 8(b)(7)(C) of the Act, 29 U.S.C. 158(b)(4)(ii)(B) and 158(b)(7)(C). The Board found that the Union's statement that petitioner's employees should make their own decision regarding the informational picket line did not constitute inducement within the meaning of subparagraph (i) of Section 8(b)(4), and that the Union did not threaten petitioner with economic reprisal within the meaning of subparagraph (ii) of that Section. The Board further found that the work stoppage did not have the disruptive effect necessary to render the otherwise lawful informational picketing violative of Section 8(b)(7)(C) (Pet. App. C19-C20, C22).

The Board rejected petitioner's further contention that the no-strike clause of the collective bargaining agreement waived the employees' right to engage in sympathy strikes. The Board stated (Pet. App. C20):

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[3]The arbitrator's decision is set out at Pet. App. D1-D22.

> The right is not expressly prohibited by the language, and a prohibition may not be implied, because the contract restriction on strikes is tied to the procedure for the orderly settlement of grievances arising under the contract. Since neither the cause of, nor the issue underlying, the sympathy strike are subject to the settlement procedures of the contract, a ban on the sympathy strike may not be implied, *Buffalo Forge Co.* v. *United Steelworkers of America*, 428 U.S. 397, 407-408 (1976).

Finally, the Board refused to defer to the arbitrator's award, concluding that the award did not meet the standards for deferral established in *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955) (Pet. App. C2 n.2).

3. The court of appeals upheld the Board's decision and enforced its order (Pet. App. A1-A14). The court agreed with the Board that petitioner's employees' refusal to cross their fellow union members' picket line constituted concerted activity for "mutual aid and protection" that was safeguarded by Section 7 of the Act (*id.* at A5-A7). The court also agreed with the Board that the Union did not waive the statutory right to engage in sympathy strikes by agreeing to the no-strike clause since there was no " 'clear and unmistakable' " contract language, nor extrinsic evidence, demonstrating an intent to waive that right (*id.* at A7-A8). The court further explained (*id.* at A8-A9):

> [A] no-strike obligation is the quid pro quo for an undertaking by the employer to submit grievance disputes to the process of arbitration. *Boys Markets, Inc.* v. *Retail Clerks Local 770*, 398 U.S. 235 (1970). Accordingly, "[a]bsent an explicit expression of [another] intention . . . the agreement to arbitrate and the duty not to strike should be construed as having coterminous application." *Gateway Coal Co.* v. *UMW*, 414 U.S. 368, 382 (1974).

Finally, the court found no abuse of discretion in the Board's refusal to defer to the arbitration award because the award "clearly ignore[d] a long line of Board and court precedent" (Pet. App. A14).

ARGUMENT

1. Petitioner contends (Pet. 8-10) that, because "[t]he striking employees sought nothing for themselves or for any other employees of any employer" (Pet. 8), their activity was not protected activity. This contention is without merit. The action taken by petitioner's employees clearly was in support of the concerns of their fellow unionists in the Union's construction division. Such action constitutes "mutual aid or protection" in the most literal sense. See *NLRB* v. *Union Carbide Corp.*, 440 F. 2d 54, 55-56 (4th Cir.), cert. denied, 404 U.S. 826 (1971). Petitioner's reliance on *Eastex, Inc.* v. *NLRB*, 437 U.S. 556 (1978), is misplaced. The Court there recognized that Section 7 protects the right of employees to "support * * * employees of employers other than their own" (437 U.S. at 564), and cited sympathy strikes as recognized examples of such protected activity (*id.* at 564-565 n.13).[4] See also *Houston Insulation Contractors Ass'n* v. *NLRB*, 386 U.S. 664, 668-669 (1967).[5]

2. Petitioner's contention (Pet. 11-12) that the sympathy strike was prohibited by the no-strike clause rests on an

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[4] *Reed* v. *NLRB*, 430 F. 2d 331 (10th Cir. 1970), is inapposite. That case did not involve a sympathy strike, but rather a practice of refusing to work on particular days because of bad weather.

[5] The court of appeals correctly noted that the employees' right to refuse to cross a lawful picket line at their employer's place of business is not unlimited. While the employer cannot discharge an employee for such activity, an employer may hire permanent replacements when justified by substantial and legitimate business justifications. Petitioner does not contend that it discharged the two employees because it had replaced them (Pet. App. A8 n.3).

erroneous reading of *Buffalo Forge Co.* v. *United Steelworkers of America*, 428 U.S. 397 (1976). Contrary to petitioner's suggestion (Pet. 12), the Court there did not hold that sympathy strikes are traditionally precluded by a broad no-strike arbitration provision. Rather, the Court refused to enjoin a sympathy walkout, stating that "[t]o the extent that * * * courts * * * have assumed that a mandatory arbitration clause implies a commitment not to engage in sympathy strikes, they are wrong." 428 U.S. at 408 n.10. The Court explained that the "*quid pro quo* for the employer's promise to arbitrate was the union's obligation not to strike over issues that were subject to the arbitration machinery" and that there, as here, the sympathy strike was not over any issue subject to the contract's provisions. *Id.* at 407-408. Thus, the Board's position, upheld by the court of appeals, that prohibition of sympathy strikes by a no-strike clause will not be implied, absent clear evidence of the parties' intent to encompass such strikes, is consistent with *Buffalo Forge*.

3. Petitioner's contention (Pet. 13-16) that the Board erred in not adopting the arbitrator's conclusion that the walkout was illegal is similarly without merit. Certainly the question whether a no-strike clause applies to a sympathy strike is appropriate for arbitration. See *Buffalo Forge Co.* v. *United Steelworkers of America, supra*, 428 U.S. at 410. But it is well settled that the Board is not compelled to defer to arbitral processes when an unfair labor practice has been committed, although it may elect in its discretion to do so. See *NLRB* v. *Strong*, 393 U.S. 357, 360-362 (1969). And when the Board does assert jurisdiction, its decisions take precedence over arbitral awards that enforce private contract rights. See *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, 272 (1964).

Consistent with these principles, the Board has had a longstanding policy of deferring to an arbitral award where the arbitrator's decision is not repugnant to the purposes of

the Act, the arbitration procedures are fair and regular, and all parties have agreed to be bound by the award. *Spielberg Mfg. Co., supra.* The Board applied that policy here and declined to defer to the arbitrator's decision because it would have been repugnant to the purposes of the Act to do so. In this case, the arbitrator assumed, without discussion of the applicable principles and contrary to established Board and court precedent, that the sympathy walkout violated the contractual no-strike clause. The court of appeals correctly held that, in these circumstances, the Board did not abuse its discretion in refusing to defer to the arbitrator's decision (Pet. App. A11-A14).[6]

4. Petitioner's final contention (Pet. 16-20) is that the Union's picketing had an unlawful secondary objective in that it was intended to coerce petitioner to cease doing business with Houchin by inducing a work stoppage of petitioner's employees. This contention simply takes issue with the Board's contrary factual findings, which were upheld by the court of appeals. That evidentiary issue does not warrant review by this Court. *Universal Camera Corp.*

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[6]Contrary to petitioner's contention (Pet. 15), *NLRB* v. *Pincus Bros., Inc.*, 620 F. 2d 367 (3d Cir. 1980), and *Douglas Aircraft Co.* v. *NLRB*, 609 F. 2d 352 (9th Cir. 1979), do not conflict with the instant case. In *Pincus*, as the court of appeals noted (Pet. App. A14 n.17), the arbitrator's award was arguably consistent with the Act. In *Douglas Aircraft*, the arbitrator found two independent reasons for discharge, one of which the court found was not repugnant to the Act. These decisions have no application here where the court of appeals correctly found (Pet. App. A14-A15 n.7) that "the sympathy strike is not even arguably unprotected." Indeed, more recent decisions by the Third and Ninth Circuits have reaffirmed their recognition that the Board may refuse to defer to arbitration if it would be repugnant to the purposes of the Act to do so. See *NLRB* v. *General Warehouse Corp.*, No. 80-1472 (3d Cir. Mar. 10, 1981); *NLRB* v. *Max Factor & Co.*, 640 F. 2d 197 (9th Cir. 1980), cert. denied, No. 80-1246 (May 18, 1981). *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 615 F. 2d 1194 (8th Cir. 1980), on which petitioner also relies (Pet. 15), has since been reversed by this Court, No. 79-2006 (Apr. 6, 1981).

v. *NLRB*, 340 U.S. 474, 479 (1951).[7] *Local 761, IUE* v. *NLRB*, 366 U.S. 667 (1961), does not support petitioner's contention (Pet. 18-19) that the Union was not entitled to engage in informational picketing at petitioner's plant because it was a neutral employer in the Union's dispute with Houchin. The Court there merely upheld the Board's position that the neutral employer could attempt to lessen the impact of the picketing on its employees by establishing a separate gate and limiting the disfavored contractor and its employees to that gate.[8]

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[7]Petitioner asserts (Pet. 17) that the Union warned petitioner "of a problem if a non-union electrical contractor performed work" at the plant, told petitioner's employees in advance that a picket might be at the plant, and did nothing to stop the picketing. The record shows, however, that Union Business Agent Sroufe merely inquired if Houchin might get the work and never received an answer (Pet. App. C14-C15, C19). Nor did Sroufe tell petitioner's employees that there might be picketing if Houchin got the job. He only stated that there was a possibility that some work might go to a nonunion contractor and that he would try to work out the problem with petitioner (Pet. App. C15, C19). In addition, the record shows that the Union business agent first told the employees they should do as they wished regarding response to the picket line, and, after learning that most of the first shift left work, instructed the second shift to cross the line and work (Pet. App. C10-C11).

[8]Petitioner did not avail itself of this option until after its employees had walked off the job. On the day after the picketing began, petitioner established a separate gate for Houchin's employees, and the Union removed its pickets to that gate (Pet. App. C16-C17).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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